**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**
**SECOND APPEAL NO.56 OF 2006**

Rajaram Sudam Mahadik ...Appellant
Vs.
Anusaya Sudam Mahadik & Ors. ...Respondents

Mr P. D. Dalvi for the Appellant.
None for the Respondents.

**CORAM : A. S. OKA, J.**
**DATE : MARCH 10, 2006.**

**P.C.:**

1. Heard Shri Dalvi appearing for the Appellant-original Defendant No.1. The Respondent No.1 is the original Plaintiff. The Respondent No.1 is the mother of the Appellant. The Respondent Nos.2 to 4 are the other sons of the Respondent No.1 and the Respondent Nos.5 to 7 are the daughters of the Respondent No.1. The Respondent No.1 filed a suit for partition and separate possession of her share in the suit property. The suit was filed in the year 1995. The husband of the Respondent No.1 and the father of the Appellant died on 06th October, 1993. The Trial Court decreed the suit by holding that the Respondent No.1 has 1/8th share in the suit properties. The Trial Court passed a decree of declaration that the Will Deed dated 05th January, 1991 allegedly executed by deceased husband of the Respondent No.1 is false and bogus one. The decree of the Trial Court has been confirmed by the Appellate Court.

2. Shri Dalvi, learned Counsel appearing for the Appellant submitted that in so far as declaration regarding Will is concerned, the prayer was clearly barred by limitation as the suit is instituted three years after the execution of the Will. He submitted that to that extent the decree passed by the Trial Court is erroneous. The second submission is that there was a partition effected between father and sons in the year 1982 in which the Respondent No.1-mother was completely excluded. He submitted that as suit was filed on 1995 i.e. thirtheen years after the ouster of the Respondent No.1, the prayer of partition was barred by limitation.

3. I have considered the submissions. The suit is substantially filed for relief of partition and possession and as a consequential relief, declaration is claimed as regards Will dated 05th January, 1991 allegedly executed by the deceased husband of the Respondent No.1 which is set up by the Appellant. In a suit for partition even assuming that the Respondent No.1 had not made a prayer as regards declaration of the Will, it was for the Appellant who was relying upon the Will to establish the execution of the Will by way of defence to the prayer for partition. However, the Appellant could not establish the execution of the Will. Both the Courts below have

recorded a finding of fact to that effect. The Appellant failed to examine the attesting witness though attesting witness was available. The Trial Court observed that sufficient opportunity was granted to the Appellant to examine the attesting witness. However, the Appellant did not avail of that benefit. Thus, if execution of the Will is not proved, the Respondent No.1 must succeed in the suit even without claiming declaration as regards illegality of the Will. In any event, the husband of the Respondent No.1 died in 1993 and therefore, limitation will start running from the date of death. Therefore, there is no merit in the first contention of Shri Dalvi. So far the second contention of is concerned, plea of partition executed in the year 1982 is based only on the mutation entries. There is no evidence on record to show that there was a partition effected between father and the sons by metes and bounds. Apart from this fact, after the demise of her husband, the Respondent No.1 may be entitled to reopen of the alleged partition. There is nothing on record to establish the plea of ouster. Courts below have rightly rejected the said plea.

4. There is no merit in the Appeal and the same is dismissed with no orders as to costs.

**JUDGE**